No. 12,715

IN THE

United States Court of Appeals

For the Ninth Circuit

LILBURN H. BARBEAU,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

The above named appellant, Lilburn H. Barbeau, presents this his petition for rehearing in said cause, and in support thereof respectfully represents:

I.

PRELIMINARY STATEMENT.

It is my contention, as counsel for the petitioner, that it is apparent from the whole record of this case that the defendant did not have a fair trial. I contend also that the arguments contained in the brief of appellant have not received due consideration by the distinguished jurist who wrote the majority opin-

ion in this case. I will state further that I am impelled by a sincere belief in the innocence of the defendant, and the conviction that he did not have a fair trial.

The burden is upon me to convince this court that its majority opinion is unsound. To do this I labor under the necessity of attacking the opinion as if it were a reply brief of the government. My confidence in the ultimate fairness of this court warrants the assumption that I may safely do so. Yet it is with some degree of temerity that I venture the assertion that in my opinion the majority opinion impresses me as more characteristic of the brief of a prosecutor than a judicial opinion.

I have some authority which approves my venturesomeness.

In a volume entitled "Effective Appellate Advocacy", by Fredrick Bernays Wiener, of the District of Columbia Bar, formerly assistant to the Solicitor General of the United States, I find the following:

> "Section 82, Petitions for rehearing.—Petitions for rehearing can be more poetically—and more accurately—labeled as 'Love's Labor Lost'.
>
> "The normal petition for rehearing has about the same chance of success as the proverbial snowball on the far side of the River Styx."

And the chapter concludes with:

> "A brief should be written to persuade; *it should pull no punches;* but it must be honest, and it must be accurate." (Italics mine.)

I shall heed these admonitions to the best of my ability.

II.

THE DEFENDANT DID NOT HAVE A FAIR TRIAL.

If, after a review of the whole record in this case, one is left in doubt as to whether or not the defendant had a fair trial, then the judgment of conviction should not stand.

I say the defendant did not have a fair trial because: First, He was compelled to defend himself against an indictment charging murder in the first degree, an indictment found, as the event proved, without sufficient evidence to support it—all the witnesses, except one, who testified before the Grand Jury also testified at the trial, and many more, yet after all the evidence was in, the court instructed the jury to acquit the defendant of murder in the first degree. Many hours were consumed by the prosecution in an effort to prove that Barbeau was a thief and committed a murder to avoid detection, yet after thorough investigation by the police department the car with the alleged stolen transmission in it was returned to Barbeau, and he was never charged with or arrested for larceny. There can be no doubt whatever that some members of the jury must have been impressed, as is always the case, with the arguments and views of the district attorney in support of the murder charge, and the larceny charge, and that their verdict of guilty of manslaughter by culpable negli-

gence was at least to some extent the result of the defendant being held before their eyes for days as a murderer and a thief.

A coroner's jury investigated the death of Paul Gunn a short time after the homicide and no arrest or bind-over resulted therefrom. The record shows that the witnesses at the inquest were witnesses at the trial, and included only those who were present at the scene of the homicide when it occurred or shortly thereafter, and whose testimony was limited to the facts pertaining to the shooting and circumstances connected therewith.

I say there was no arrest or bind-over as a result of the coroner's inquest. An examination of the original indictment, which was transmitted by the clerk of the District Court to the clerk of this Court of Appeals, will disclose that on the back thereof is the endorsement "Secret", which means that the case originated with the grand jury, that the defendant was neither in custody nor on bail, consequently could not have been arrested nor held to answer, which would have been the result of a finding by the coroner's jury unfavorable to Barbeau.

It may fairly be inferred that the disposition of the case by the coroner's jury was not unfavorable to Barbeau.

Had Barbeau been tried for manslaughter by culpable negligence, and that crime alone, by a jury not influenced by the ill-founded accusations of murder and theft, it is a foregone conclusion that their ver-

dict would have been "Not Guilty". The verdict returned was a compromise verdict. Therefore I repeat that Barbeau did not have a fair trial.

Second: Murder in the second degree should not have been left in the case.

In its opinion this court states (page 8): "In any event, since Barbeau was not convicted of second degree murder, he cannot now claim prejudice on his appeal."

On the contrary, it was the very fact that an ill-founded charge of murder in the second degree was left in the case that lessened Barbeau's chance of acquittal on the charge of manslaughter by culpable negligence. His acquittal of second degree serves only to support my contention that the charge was ill-founded. All the evidence, all the arguments and contentions of the district attorney which would have supported his contention that Barbeau was guilty of murder in the first degree were left in the case, and affected his chances of acquittal of the crime with which he was not charged, but of which he was convicted.

III.

MURDER IN THE SECOND DEGREE.

Under some circumstances, as in the present case, it is extremely difficult to draw the line between murder in the first and second degrees. At common law there were no degrees of murder. The distinction is

statutory. Our statute states that whoever purposely and maliciously kills another is guilty of murder in the second degree. The indictment here adds the words, "and of deliberate and premeditated malice". Our district court has time and again instructed juries that no particular length of time is necessary for deliberation and premeditation, that any length of time, however short, is sufficient. That it is sufficient if the purpose of killing is weighed long enough to form a fixed design to kill. The weight of authority supports this view.

In the present case, evidence concerning a stolen transmission was admitted to show motive for murder, and intent and purpose to kill. This evidence remained in the case to show intent and purpose to kill. Under the circumstances of this homicide, could Barbeau, with a motive to kill, have formed the purpose to kill, and fired the fatal shot, without weighing that purpose long enough to "form a fixed design to kill", thus becoming guilty of murder in the first degree?

In this case the difference between the quantum of evidence necessary to sustain a charge of first degree murder, and that necessary to sustain a charge of second degree murder, is so slight as to be undiscernable.

The trial judge eliminated murder in the first degree from the case, there being no evidence whatever of deliberate and premeditated malice. There was

also lacking sufficient evidence of motive to justify more than suspicion.

My conclusion is that murder in the second degree should have been eliminated from the case, as was murder in the first degree.

Furthermore, there could not possibly have been sufficient evidence before the grand jury to make out that prima facie case requisite to returning an indictment for either degree of murder. I reiterate what I stated in appellant's brief on appeal, that the U. S. Attorney procured this indictment either in the hope of securing more evidence before the trial, or else to facilitate the conviction of a lesser offense, which purpose was accomplished. It is a well known fact that grand juries are generally rubber stamps for the district attorney, as inevitably some petit jurors are prone to be. Occasionally grand juries rise to an exaggerated sense of their omnipotence, get out of hand and go hog-wild, uncontrolled by prosecutors, or even judges, but this is on rare occasions.

IV.

MOTIONS FOR ACQUITTAL AND IN ARREST OF JUDGMENT.

At the conclusion of all the evidence the defense moved for judgment of acquittal, which if granted would have disposed of the crime charged in the indictment and all included offenses. (T.R. Vol. V, pages 507-509.) Thereafter, pursuant to Rule 29(b),

on July 5, 1950, motion for acquittal was filed (probably out of time). (T.R. Vol. I, page 28.)

Motion in arrest of judgment was filed July 5, 1950. (T.R. Vol. I, page 36.)

V.

THE MAJORITY OPINION.

On page 5 of the opinion this court states several propositions which I believe are untenable, as follows:

1. "On the appeal, this court does not look to the words of the indictment alone in order to judge of its sufficiency."

This is true if the court means that it may draw legitimate inferences from the words of the indictment. It cannot be true if it means that the court can look elsewhere than at the indictment to determine its sufficiency.

2. That Rule 52(a) of the Criminal Rules may be invoked to cure an indictment otherwise defective, stating that this rule is a restatement of former Sec. 556 of Title 18. The rule is also a restatement of Sec. 391, Title 28, which provided:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

> See volume entitled "Federal Rules of Criminal Procedure with Notes and Institute Proceedings," published by the New York School of Law in 1946, with notes prepared under the direction of the advisory committee, appointed by the United States Supreme Court, page 88, Rule 52(a).

I am confident that a brief consideration of the authorities will convince the court that it has misapplied the harmless error rule.

Both Sec. 556 of Title 18 and Sec. 391 of Title 28 were the law for a long time prior to the adoption of the Federal Rules of Criminal Procedure. These statutes have been invoked in recent years on numerous occasions to bolster up defective indictments. Their use for any such purpose is a misapplication of the purpose of these harmless error statutes. They were not enacted as cure-alls. They cannot aid an indictment defective in any substantial particular; it has been so held by the highest courts in very many recent decisions. The following is cited from *Sutton v. United States,* 157 Fed. (2d) 668-670.

> "Rule 34. Arrest of Judgment. The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period.

"In plain words, the above rule peremptorily provides that the court shall arrest judgment if the indictment or information does not charge an offense. That this was the law prior to March 21, 1946, and at the time of the trial below, is clear from the authorities, except as to the change of time within which such motions may be made. With this minor exception, Rule 34 is merely declaratory of existing law; it does not conflict with 18 U.S.C.A. Sec. 556 or 28 U.S.C.A. Sec. 391, but should be interpreted harmoniously with these procedural statutes, and neither this rule nor these statutes impaired or restricted the right of an accused to be fully and definitely informed of the particular charge against him. Every defendant in a criminal case has the right to be informed of the essential factual elements of the offense sought to be charged. The Sixth Amendment guarantees it. To withhold essential facts that are required to describe the accusation with reasonable certainty is to deny full information of the nature and cause of the accusation.

"Upon the subject of the necessity of an indictment or information containing every essential element of the offense, no more direct and positive statement has been found than that of Hutcheson, Circuit Judge, concurring in Grimsley v. United States, 50 F. 2d 509, 511, 512, as follows:

" 'The opinion of the majority is an extremely simple and, as I think, correct statement of the principle that two substantial things must concur before a defendant may be convicted of a felony in a court of the United States; (1) He must be charged by indictment with the commission of

a federal offense; (2) The offense must be proven against him.

" 'I have always supposed that as an indictment without proof cannot support a conviction, so proof without indictment cannot.

" 'That Congress by the Act of February 26, 1919, 28 U.S.C.A. Sec. 391, either intended or has effected the result that in federal courts proof of a federal offense is now the only matter of substance, that indictment is mere technicality, and may, when proof is ample, be entirely dispensed with, I do not believe.

" 'No case has yet been found by me which declares that failure to charge the essential element of an offense is a mere technicality; on the contrary, there is general concurrence in the statement that if "the indictment fails to state facts sufficient to constitute the crime charged, the judgment of conviction cannot, of course, be sustained." Sonnenberg v. United States, 9 Cir., 264 F. 327, 328; Wong Tai v. United States, 273 U.S. 77, 80, 46 S. Ct. 300, 71 L. Ed. 545; Wishart v. United States, 8 Cir., 29 F. 2d 103, 106; Shilter v. United States, 9 Cir., 257 F. 724, and this even in the absence of an attack of any kind upon the indictment in the court below. Sonnenberg v. United States, 9 Cir., 264 F. 327, 328.

" 'Where the indictment has been challenged by demurrer, raising not technicality, but matters of substance, and the demurrer has been erroneously overruled, by that much more is it clear that a conviction upon such indictment must be reversed. Moore v. United States, 160 U.S. 268, 16 S. Ct. 294, 40 L. Ed. 422.

" 'Technicality and substance are not so confused in my mind as that I can bring myself to believe that failure to charge the substantive elements of a federal offense constitutes "technical error, defect, or exception which does not affect the substantial rights" of the defendant.'

"It is expressly held in the above case that an indictment is fatally defective if it omits an essential element of the offense sought to be charged; and that the right of an accused to be informed of the nature and cause of the accusation against him is a substantial right, the enjoyment of which is assured by the Sixth Amendment. Then for good measure the court adds: 'It is not a mere technical or formal right, within the meaning of 18 U.S.C.A. Sec. 556 or 28 U.S. C.A. Sec. 391.' "

I cite a brief extract from the opinion of Justice Rutledge in *Kotteakos v. United States,* decided in 1946:

"If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. Bruno v. United States, supra, at 294. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart

> from the phrase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."
>
> *Kotteakos v. United States,* 328 U.S., pages 764-765.

And the following from *Bruno v. United States* (1939), opinion by Justice Frankfurter:

> "The Statute requiring appellate courts to disregard technical errors not affecting substantial rights was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict. 28 U.S.C.A. 391."
>
> *Bruno v. United States,* 308 U.S. 297.

This court will undoubtedly concede that the right of a defendant to be informed of the nature and cause of the accusation against him is a "constitutional norm" within the meaning of the opinion in the *Kotteakos* case.

The *Sutton* case, decided in 1946, not only brings up to date the doctrine established by the authorities heretofore cited, but clearly explains to what extent the provisions of 18 U.S.C.A. Sec. 556 and 28 U.S.C.A. Sec. 391 affect the question of the sufficiency of a given indictment. The *Sutton* case clears the confusion resulting from the decisions of some courts, which, regarding these sections as cure-alls, have misapplied them in upholding indictments of doubtful sufficiency.

It is not contended in the present case that the indictment does not properly charge the offense of murder in the first degree.

It is contended, however, that it does not charge the offense for which the defendant was convicted, to-wit: manslaughter by culpable negligence.

If the indictment did not charge the offense for which the defendant was convicted it must be conceded that the court had no jurisdiction to pronounce judgment.

3. The third proposition in this court's opinion which I regard as untenable is, that Barbeau was not prejudiced by the lack of information in the indictment as to the nature and cause of the accusation against him, because he acquired that information from sources outside the indictment.

This is as much as to say, to quote the *Sutton* case, that the "indictment is a mere technicality", and may be "entirely dispensed with".

4. I also take exception to this court's statement that Barbeau knew the charge against him to the extent that he was not substantially prejudiced during the trial; that he knew the charge against him since his attorney in his opening statement to the jury said, "The shooting which occurred on the date alleged, was simon-pure accident without the default of the defendant".

That Barbeau suffered no prejudice because his attorney at the close of the government's case and

at the close of the whole case conceded that there was evidence of negligence to go to the jury; and because his counsel asked the court for instructions on the crime of manslaughter by culpable negligence, but did not ask for an instruction that manslaughter by culpable negligence was not included in a charge of murder.

In answer to these propositions let me state that the Laws of Alaska provide that after the prosecution has made its opening statement, the defendant or his counsel must then state his defense, and may briefly state the evidence he expects to offer in support of it. (Sec. 66-13-51, A.C.L.A., 1949.)

This District Court construes this statute to be mandatory, and does not permit the defense to waive the opening statement.

The indictment charged murder and all necessarily included offenses. Accidental shooting if proven would be a perfect defense to any charge directly or by inclusion set forth in the indictment. I cannot follow the reasoning of this court that the statement of defendant's counsel imputes knowledge on his part that evidence would be introduced to prove that Barbeau was guilty of homicide by culpable negligence, or that it imputes such knowledge to Barbeau.

This court, in effect, says that it was of no importance that the indictment did not charge the offense for which Barbeau was tried and convicted; that he could not be prejudiced, provided he knew what the charge was from other sources.

This court overlooks the rule of law which is approved by all authorities, without exception, which is,

> "Since every person is presumed to be innocent until proven guilty, it logically follows that he must be presumed also to be ignorant of what is intended to be proved against him, except as he is informed by the indictment or information."

This doctrine is stated in *People v. Marion,* 28 Mich. 257, and is approved and quoted in the following cases:

State v. McKenna, 67 Pac. 815;
State v. Topham, 123 Pac. 888;
Hemphill v. State, 6 Pac. (2d) 450.

> "When one is indicted for a serious offense, the presumption is that he is innocent thereof and consequently that he is ignorant of the facts on which the pleader formed his charges, and it is a fundamental rule that the sufficiency of an indictment must be tested on the presumption that the defendant is innocent and has no knowledge of the facts charged against him in the pleading. Miller v. United States, 133 Fed. 337, 341, Naftzger v. United States, 200 Fed. 494, 502."
>
> *Fontana v. United States,* 262 Fed. 286.

VI.

Referring back to page 5 of the majority opinion, let me state that the facts there stated are true; that not all the facts are stated, and that the conclusions of the court from those facts appear to me unsound.

I did move for an acquittal of the crime of murder at the close of the government's case. (T.R. Vol. IV, 292.) In the course of argument on that motion and after the court had denied it, and in reply to the trial court's statement to the effect that the case must go to the jury on the matter of the homicide, I did assume for the purpose of argument that there was enough evidence to go to the jury on the question of culpable negligence, at the same time stating that the rules were not clear as to included offenses. (T.R. Vol. IV, 300.)

The motion for acquittal was renewed at the close of all the evidence and as the proceedings in connection with the argument show, was intended and understood by the court, as the court expressly stated, to cover all included offenses, including manslaughter by culpable negligence. (T.R. Vol. V, 507, 508, and 509.) The motion having been overruled except as to murder in the first degree, the defense made a special motion for acquittal of murder in the second degree and a motion to instruct the jury only as to culpable negligence. The defense did not thereby waive any error committed in overruling its motion for an acquittal. Moreover the defense did not waive the question of jurisdiction. It could not waive jurisdiction. It could not stipulate jurisdiction. It appearing inevitable that the question of culpable negligence would go to the jury, the defense pursued the course which at the time seemed for the best interests of the defendant, and, I am frank to state, the question of whether manslaughter by culpable negligence was an included offense, was not under serious consideration

at the time, as appears from my remarks at the close of the government's case, to which reference has been made. As the court states, I did not ask for an instruction that manslaughter by culpable negligence was not an included offense. And for the above reasons.

I did subsequently raise that question, by motions for a new trial, in arrest of judgment, and for judgment of acquittal, which were denied by the court, its written opinion appearing in T.R. Vol. I, page 44.

This court has followed this opinion in its decision. I believe erroneously. Be that as it may, I repeat, that the indictment in this case cannot be saved by Rule 52(a), or on any of the grounds stated in this court's opinion on page 5, but if saved at all it must be on the ground that homicide by culpable negligence is necessarily included in a charge of murder in the first degree, and I shall now proceed to discuss that question.

VII.

NECESSARILY INCLUDED OFFENSES.

On page 4 of the opinion this court states,

> "The courts of California, Idaho, Montana, Oregon, and Washington have all held that a charge of murder will support a conviction for the crime of manslaughter"

and

> "All of these decisions state the generalization that *all* degrees of homicide which the law will

> punish are included in a charge of unlawful killing, so long as the verdict finds a lesser degree of homicide than was charged in the indictment."

This court proceeds to state,

> "We regard the logical extension of these cases in the Western states as the sound view on the question before us."

This might be true if the "generalization" stated were itself logical and did not lead to an absurdity, but it does.

I say that the generalization would be true if it were qualified by the addition of the words, "provided the indictment charges the lesser degree of homicide".

As stated in my brief on appeal, the Alaska Code defines manslaughter as an unlawful killing which is not murder in the first or second degree. (A.C.L.A. 65-4-4.) Then in separate sections the code enacts that any person who shall cause the death of another, by procuring another to commit self murder, by abortion, by a physician administering poison, etc., and by negligent homicide, "shall be deemed guilty of manslaughter".

The generalization states that all degrees of homicide which the law will punish are included in a charge of unlawful killing, so long as the verdict finds a lesser degree of homicide than was charged in the indictment.

Does that apply to manslaughter by abortion? Unless such offense was specifically stated in the indictment?

Or to any other species of manslaughter, separately defined by the code, including negligent homicide? Certainly not. The generalization is not sound. It is absurd.

It is founded on a sophistic syllogism, thus,

> An indictment for murder necessarily includes a charge of manslaughter.

Homicide by abortion is manslaughter.

Therefore homicide by abortion is necessarily included in an indictment for murder.

> "The juggle of sophistry consists, for the most part, in using a word in one sense in the premise, and in another sense in the conclusion." (Coleridge.)

On page 6 of the court's opinion is the statement,

> "Nothing in this opinion is in conflict with our decision in Giles v. United States, 144 Fed. 2d 860."

In my brief on appeal I cited the *Giles* case for one purpose only, to quote the concise and absolutely sound definition of a "necessarily included offense" which this court, and the judge who wrote the opinion in the present case approved, as follows:

> "To be necessarily included in the greater offense the lesser must be such that it is impossible to

commit the greater without having first committed the lesser."

The foregoing is an able statement of the law and the consensus of opinion of all the authorities except those, mostly western states, which notoriously dispense with constitutional requirements and ignore the principle that the defendant is entitled to be informed of the nature and cause of the accusation against him. And this means by the indictment, and from no other sources.

The foregoing quoted statement is worthy of the eminent jurist who first uttered it and of the approval of this court. The doctrine of the decisions of the western states is not, and I am at loss to comprehend why this court should discard sound for fallacious reasoning for the sake of the "struggle to break away from the early formalism of criminal pleading", as the court expresses it on page 2 of the opinion.

Rule 31(c) is a restatement of existing law, 18 U.S.C. 565. It is from the Act of June 1, 1872, and ever since that date at least, and probably before that, there have been convictions of lesser and included offenses. The charge of negligent homicide is neither *included nor necessarily included* in a charge of murder in the first degree. It is repugnant to and inconsistent with the latter charge. If permitted at all in an indictment for murder it should be set off in a separate count. Is there anything reactionary in letting a defendant know from the indictment exactly for what offense he is on trial?

This court in its opinion admits that the question under discussion is not completely settled. If the court's decision is to stand, then the question will have been settled and a vicious precedent established.

VIII.

THE WESTERN STATES.

One of the western decisions upheld an indictment for manslaughter in the following form:

"On the.....day of....., at ..... A unlawfully killed B." Concerning which another western judge stated, "This form of indictment would cover every homicide committed since Cain slew Abel."

And in *People v. King,* 27 Cal. 507, decided in 1865,

> "If the defendant is guilty, *he stands in need of no information* to be derived from a perusal of the indictment, as to the means used by him in committing the act or the manner in which it was done, for as to both his own knowledge is quite as reliable as any statements contained in the indictment. If he is not guilty, the information could not aid in the preparation of his defense."

In *People v. King,* the court remarks on the change in pleading and practice in criminal and civil actions, stating:

> "Both are fruits of the progressive spirit which, in modern times, has endeavored at least, to do away with the mere forms and technicalities of the common law."

If that opinion expresses the "progressive spirit", then I am an ultra-conservative.

The California jurist was just one step behind the vigilantes. Up to date no federal court has irrevocably carried this progressive spirit to such ridiculous lengths.

It is difficult for me to ascribe the opinion under attack, to this court, or to the learned jurist whose name appears as the author. I have diligently followed the decisions of this court ever since the days of the "Spoilers" of 1900. I argued my first case before this court in 1910. My colleagues and I have had confidence in, and have looked upon our Court of Appeals with a feeling akin to pride, if not reverence. My present feeling is more akin to mortification. As I intimated at the outset, the opinion in this case impresses me as would the brief on appeal of a prosecuting attorney, in a frantic effort to sustain a conviction by fallacious reasoning, and as a last resort, by invoking the harmless error rule, which is habitually misapplied by prosecuting officers in their efforts to sustain defective indictments, and if in this petition I have "pulled no punches" it is because I am constantly laboring under the impression that I am writing a reply to the brief of a prosecuting officer.

IX.

THE MERITS OF THE CASE ON THE FACTS AND THE LAW AS EXPRESSED IN THE DISSENTING OPINION.

I am laboring under somewhat of a handicap in discussing the facts of this case for the reason that my views have already been expressed in a clear, concise, lucid, and emphatic dissenting opinion. The majority opinion necessarily must have been written with full knowledge, and after some consideration of those views.

With respect to law points involved the dissenting opinion in one respect does not reflect my views. It states that pages of testimony and certain exhibits are in the case relating to a possible wrong doing relating to an automobile in the interest of showing a motive for the killing, and that the jury should have been instructed that this testimony was applicable only to the degree of homicide above "manslaughter by culpable negligence" since that crime imports no intent to kill.

My position is and was that this testimony should not have been allowed to go to the jury because evidence of motive had no bearing on the crime of murder in the second degree as distinguished from murder in the first degree; that under the facts and circumstances of this case the line between first and second degree murder was so faint as to be undiscernable, and that first degree murder having been eliminated from the case, second degree murder should have gone out also, thus partly removing the prejudice already created by ill-founded accusations, and thus preventing

further prejudice by argument of the district attorney in support of those accusations of murder and theft.

As to the statement in the dissenting opinion that in the crime of "manslaughter by culpable negligence imports no intent to kill", I have expressed a different view. In my brief on appeal on page 24, I cited *Reed v. Madden,* 87 F. (2d) 851 (1) as approving the following:

> "To make negligent conduct culpable or criminal and make it manslaughter, the particular negligent conduct of the defendant must have been of such a reckless or wanton character as to indicate on his part utter indifference to the life of another who is killed as a result thereof. Thus only may the criminal intent, so essential in a criminal prosecution, properly be found by the jury. It is difficult to ascribe to Reed either any intent to injure, or this essential degree of wanton and reckless conduct, under the circumstances and conditions by which he was surrounded. * * *"

And I requested an instruction quoting the above statement of the law, which the trial court refused.

I do not believe that facts of the homicide itself could have possibly convinced the jury beyond a reasonable doubt, that the negligence of Barbeau was of such reckless and wanton character as to indicate on his part utter indifference to the life of another, or the criminal intent essential to justify a conviction. The motion for acquittal made after the close of the whole case, as expressly understood by the court, covered all grades of homicide and should have been granted.

X.

THE FACTS.

The statement in the majority opinion of admitted facts, beginning on page 6 and ending with the first paragraph on page 6 and 7 is extremely accurate and fair with one exception.

Referring to the time of the homicide, the opinion states, "He (Gunn) and Barbeau were at that time suspected by the police of stealing the transmission which had recently been put in the car."

The testimony showed that at that time they *had been* under suspicion, the matter had been thoroughly investigated, both men had been questioned, the car which had been taken by the police and kept several days, returned to them, together with the transmission, and no arrest made. Apparently they were no longer under suspicion.

In the next paragraph, however, there is a misstatement, fair enough perhaps from the standpoint of a district attorney making a closing argument, and feeling safe from interruption, but not fair from a judicial standpoint.

The opinion says:

> "There was a conflict in the evidence as to whether Barbeau had put the safety mechanism on the gun before shoving the clip into the gun. He stated to the police that *after* he fired his gun he put it 'on safety'. Inasmuch as the court seems to indicate that the question of the degree of Barbeau's negligence hinges on the testimony as whether the safety was on or off, let us analyze the testimony further."

This court should have added to its statement, "He stated to the police that *after* he fired his gun he put it 'on safety' ", the words, "At least a policeman so testified". From my experience there is no such conclusive presumption of truth attached to the testimony of policemen as to render their testimony immune to discredit. My own experience has been to the contrary. When responsible for, or interested in a prosecution policemen are at least not over-inclined to favor the defendant. It could have been, that chagrined at being unable to pin a theft on Barbeau, they instigated this prosecution, or at least were in sympathy with it. What a policeman said he was told should not be taken as conclusive proof of the ultimate fact.

This court leaves the issue on this crucial issue as disposed of by a recital of what the police testified that Barbeau said, and what Barbeau later testified to be the fact, and then says:

> "The jury resolved this conflict against Barbeau, and this finding is sufficient to sustain a finding of culpable negligence."

This is an extremely limited condensation of the conflicting testimony, and indicates a very cursory examination of the record by the writer of the opinion. The record shows that Barbeau was questioned with respect to this testimony of the police and denied it emphatically. Barbeau's testimony on the subject was as follows:

Q. And when he handed you the gun what did you then do?

A. Whenever he handed me the gun we were sitting just about like this facing together and Mr. Gunn was sitting practically the same position as Mr. Grigsby, possibly a little further over to my left, he handed me the gun. I took it, ejected it to see if there was a shell in it, picked up the clip, jammed it in and that is when it went off.

Q. Now, do you know, Mr. Barbeau, whether or not when you pulled the slide back to see whether there was anything in the chamber whether or not the slide went forward or remained back?

A. No, I don't because I always load a gun in the same way. I look at the gun and put the clip in and then eject the chamber and then drop the extra shell into the barrel and leave it go forward and it is on safety. The chamber is supposed to go back and it will not fire in that position.

Q. What was the position of the safety on the gun which Mr. Howe handed you at the time the shot went off?

A. At the time that the shot went off the gun is exactly like it is now. It was on safety. After the shot the gun was still on safety in this position exactly as set. It was laying on the floor. As I dropped it on the floor in between me. When I picked it up I noted it again. I could see that the hammer was back and I was in position and I thought that the gun may go off again and I reached down and picked the gun up and released the hammer in the same position as I did there. As I picked the gun off the hammer went forward because the barrel wasn't completely

forward and the gun was laying on the floor in this position. It was like that. And when I saw the hammer was back and I went and picked it up and released the hammer. (T.R. Vol. V, 440-441.)

And, the proper impeaching questions having been put to the policeman, Barbeau testified:

Q. Assuming that he testified in that regard, Mr. Barbeau, that you told him at some later time that you had put the gun on safety after the shot was fired, what is the fact in that regard?

A. It isn't true because I don't—I am positive that I never did tell Mr. Fox that. And I know that the gun was on safety because when I looked at the chamber of that type of gun is why. The gun was on safety because it makes it easier to eject or pull the chamber back because you can get a thumb grip on the safety and it being on safety it is easier to pull back and that is why I know the gun was on safety.

Q. And you don't recall telling officer Fox anything about putting it on safety afterwards?

A. No, sir.

Q. You didn't tell him that, did you?

A. No, sir. (T.R. Vol. V, 446.)

Furthermore, the policeman, J. C. Fox, who gave the testimony which the court recites, on June 14, 1950, nearly four months after the homicide, testified at the coroner's inquest a few days after the trial.

He was cross-examined on this very matter at the trial with reference to his testimony at the coroner's inquest and proper impeaching questions propounded. His testimony follows:

Q. Did you at that time make any mention of his having stated that he put the gun on safety and then laid it on the floor?

A. I don't remember whether I made that statement at the coroner's inquest or not. (T.R. Vol. II, 96.)

Barbeau made a statement at the police station on the day of the shooting and shortly thereafter, Fox testified that he was present and heard the statement, as follows:

Q. At that time did he state that he put the gun on safety before he laid it down?

A. At that time in the statement he did not mention putting it on safety.

Q. He did not mention it?

A. No, he did not make the statement.

Q. And you didn't mention anything about that, although you were asked what he said, at the coroner's inquest?

A. No.

Q. About putting the gun on safety?

A. No, I didn't. That was one of the small things that wasn't brought up. (T.R. Vol. II, 96-97.)

The witness, Fox, was cross-examined as to other matters which he had stated occurred at the scene of the homicide after he arrived there, for the purpose of testing his recollection and credibility.

Fox repeatedly testified at the trial that he never picked up the gun and put it in a paper bag. Chief of Police Stowell corroborated him.

Both were successfully impeached by the reporter who took the stand with her complete notes of the testimony given at the coroner's inquest. (T.R. Vol. IV, 304-306.)

So there you have it. Instead of the meagre statement in this court's opinion of the conflict in testimony the jury resolved against Barbeau, that Barbeau told the police that *after* he fired the gun he put it on safety, and later testified that the safety was on when he fired the shot, a fair review of the testimony on this crucial matter would be as follows:

> A policeman testified that Barbeau told him that after he fired the gun he put it on safety. Barbeau emphatically denied this statement and said the gun was on safety when discharged.
>
> An expert witness, highly qualified, testified that this could well have happened, not only with this type of gun, but with this particular weapon, because of the defective safety mechanism. Another qualified expert testified to the same effect, and also from his personal experience. Both were unimpeachable.
>
> The witness, Fox, was impeached as to his recollection, at least, by the record of the coroner's inquest.
>
> Chief Stowell was also impeached on the same subject. Their discredited testimony was so much in accord as to be open to suspicion.

Fox testified that he did not mention the matter of Barbeau putting the gun on safety, because it was "one of those small things that didn't come up".

This court in effect states, that loading a gun, not on safety, considering the close proximity of Gunn to the defendant justifies a finding by the jury of culpable negligence.

It must be conceded that the only testimony whatever that the gun was not on safety, was the statement of Fox, as to what Barbeau told him, testimony given four months after the event, and pure hearsay, and subject to all the infirmities of hearsay, except its admissibility as to defendant's statement—testimony by a witness thoroughly impeached as to his credibility, by a witness who had the records in his hand while testifying of all the policeman's testimony.

Fox did not testify that Barbeau told him that the gun was *not* on safety before the shot, but that he put it on safety after the shot.

Barbeau could have done both, that is put it on safety before and after the shot. He could have stated that he left the gun on safety after the shot.

Barbeau says he picked the gun up and let the hammer down because he feared it might discharge again. It would have been natural for him to have seen that it was on safety at the same time. It might not have been, this being a gun capable of freakish performances. It would not have been natural for Barbeau to have inspected the gun immediately after it fired. He says he dropped or laid it on the floor, said, "My God", rushed to Gunn's assistance, later picked it up and let the hammer down.

The dissenting opinion states that the accident could have happened exactly as appellant related it,

that it seems the jury followed mere suspicion. The majority opinion justifies the verdict by its one-sided review of the testimony regarding the "on safety" proposition. The testimony on this point preponderates in favor of Barbeau. My own conclusion is that the verdict was a compromise verdict, largely brought about by the testimony admitted to sustain the accusations of which Barbeau was acquitted, which left at least some of the jurors little disposed to draw the line between negligence, and culpable negligence. The court should adopt the dissenting opinion, draw the line for the jury and refuse to sustain the argument.

CONCLUSION.

To sustain the lower court, this court has resolved all doubtful propositions of law and fact in favor of the government.

It has established for Federal Courts a precedent as to whether manslaughter by culpable negligence is included in the offense of first degree murder, on the strength of Western state decisions by judges who have forgotten that "eternal vigilance is the price of liberty", and who long ago have emerged victorious in their "struggle to break away from the early formalism of criminal pleading". Reformers are generally crusaders and always go to extremes.

On the strength of these Western decisions founded on sophistry, this court has rejected the able definition of "necessarily included offenses" approved by this very court in *Giles v. U. S.*, supra, which ex-

presses the unanimous consensus of opinion of high authority on the question of necessarily included offenses. Also were the court's opinion written as a brief for the government I would say that it distorts the evidence on the facts in favor of the government.

Why should all, at least doubtful, questions of law and fact, be resolved against the appellant? Is there any presumption in favor of the decision of a lower court on the law? Can no doubtful question be resolved in favor of the defendant?

Realizing the immense burden under which this court constantly labors, in disposing of appealed cases, some of vastly more public importance than Barbeau's case, and the additional burden a re-argument will impose, I must nevertheless earnestly request the careful consideration of this petition.

It is regrettable the rules do not permit a reconsideration without a re-argument.

I earnestly hope that this petition will escape the usual fate of petitions for rehearing, to which I have referred in the preliminary statement.

Wherefore, upon the foregong grounds, it is respectfully urged that this petition for a rehearing be granted and that the judgment of the district court be upon further consideration reversed.

Dated, Anchorage, Alaska,
January 18, 1952.

Respectfully submitted,
GEORGE B. GRIGSBY,
Attorney for Appellant
and Petitioner.

CERTIFICATE OF COUNSEL.

I, George B. Grigsby, counsel for the above named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is in my judgment well founded and that it is not interposed for delay.

Dated, Anchorage, Alaska,
January 18, 1952.

GEORGE B. GRIGSBY,
Counsel for Appellant
and Petitioner.